

Herbert Loeffler

CONFIDENTIAL

March 29, 2006

Boston, MA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CA NO. 04-11783-RWZ
CYTOLOGIX CORPORATION,
Plaintiff,

VS.

VENTANA MEDICAL SYSTEMS,
INC.,
Defendant.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CA NO. 04-1522-GMS

VENTANA MEDICAL SYSTEMS, INC.,
Plaintiff,

VS.

DAKO CYTOMATION CALIFORNIA, INC.,
Defendant.

VIDEOTAPE DEPOSITION OF HERBERT LOEFFLER,
a witness called to testify by counsel for the
Defendant in the above-entitled matters, pursuant
to Federal Rules of Civil Procedure, before
Julie A. Bates, Registered Professional Reporter
and Notary Public in and for the Commonwealth of
Massachusetts, at the offices of Donnelly,
Conroy & Gelhaar, One Beacon Street, Boston,
Massachusetts, on Wednesday, March 29, 2006,
commencing at 9:32 a.m.

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1 MR. ZELIGER: Objection. Lack of
2 foundation and calls for a legal conclusion
3 and calls for opinion testimony.

4 (The witness reviewed the
5 documents.)

6 A. Claim 1 says, "place microscope slides on a
7 platform." So it refers to that platform.
8 And then further on in claim 1 it
9 says, "moving the platform and a liquid
10 dispenser relative to each other."

11 And claim 7 says, "on said moving
12 platform." So it refers to the platform
13 with the slides. But claim 1, as I
14 understand it, is the -- an independent
15 claim that defines that the platforms may
16 move relative to each other.

17 Q. There's only one platform in claim one,
18 right?

19 (The witness reviewed the
20 documents.)

21 A. Let's see. In claim 1 moving platform and
22 liquid dispenser -- well, it describes two
23 elements. It describes a moving platform
24 and a liquid dispenser.

25 Q. Right. But there's only one platform

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1 that's referred to in claim 1. That's the
2 slide platform, right?

3 A. Right.

4 Q. And claim 7 refers to that platform
5 as, "said moving platform," right?

6 A. That's what it says.

7 Q. Okay. Now let's go back to claim 1. The
8 fourth step of claim 1 calls for
9 "dispensing liquid from the dispenser onto
10 the slides." Do you see that?

11 A. Yes, I see it.

12 Q. And the dispenser called for in the fourth
13 step refers back to the same liquid
14 dispenser that was introduced in the third
15 step of claim 1, correct?

16 MR. ZELIGER: Same objection.

17 A. Third step of claim 1. I'm looking for
18 that.

19 (The witness reviewed the
20 documents.)

21 A. Line 31 says, "moving the platform and a
22 liquid dispenser relative to each other."

23 Q. 21 I think you meant.

24 A. 21, I'm sorry.

25 Q. Right. The third step says, "moving the

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1 all of the additions to the --

2 Q. They were made during the deposition,
3 that's correct.

4 A. All right.

5 Q. So you can ignore that for present
6 purposes. If you would just read the first
7 sentence that bridges pages 4 and 5.

8 (The witness reviewed the
9 documents.)

10 A. I've read that.

11 Q. Okay. And you see here that your attorney
12 stated that "Amended independent claim 6
13 recites independent temperature control of
14 slides in a system"?

15 MR. ZELIGER: Objection. Lack of
16 foundation.

17 A. I see the language as it's written.

18 Q. Okay. And then he says it's "in a system
19 in which," quote, "a liquid dispenser and a
20 slide supporting platform are moved
21 relative to each other in order to dispense
22 liquid on the slide." Do you see that?

23 A. Yes, it does say that.

24 Q. And it says, "liquid dispenser and a slide
25 supporting platform are moved," right?

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1 (The witness reviewed the
2 documents.)

3 A. Yes, that's what it says.

4 Q. And "are," the verb "are," is plural,
5 right?

6 A. Yes.

7 Q. And the reason it's plural is because two
8 things are being moved; namely, a liquid
9 dispenser and a slide supporting platform,
10 according to this sentence.

11 MR. ZELIGER: Objection. Lack of
12 foundation. According to part of the
13 sentence.

14 Q. Correct?

15 A. Could you please repeat the question?

16 Q. Yes. The reason the plural verb "are" is
17 used is because there are two subjects that
18 are being moved in this sentence; namely, a
19 liquid dispenser and a slide supporting
20 platform, correct?

21 MR. ZELIGER: Objection to the
22 form of the question. Lack of foundation.
23 That's not what the sentence says, that's
24 what a part of the sentence says.

25 A. Well, that part of the sentence just --

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1 does refer to two objects. "Are" would be
2 plural.

3 Q. Okay. Does that tell you that both of them
4 are moved relative to each other?

5 A. In that sentence, yes.

6 Q. Okay. Not one or the other is moved, both
7 are moved relative to each other, correct?

8 A. Well, "relative" means that they move in
9 relation to each other. It doesn't
10 necessarily mean -- it's back to the one,
11 the other, or both may move in order to
12 accomplish alignment.

13 Q. Well, it doesn't say here "liquid dispenser
14 or a slide supporting platform is moved
15 relative to the other," does it?

16 A. No, it doesn't say that.

17 Q. It says both are moved, right?

18 MR. ZELIGER: "...relative to
19 each other."

20 A. Yeah. The word "relative" is what makes it
21 possible to move one, the other, or both.

22 Q. Okay. What does "move" mean to you, the
23 verb "move"?

24 A. Displacement in relation to a reference.

25 Q. What does "displacement" mean?

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1 after I do so, I'll ask you whether you
2 gave that testimony.

3 "Question: What you were telling
4 the potential investors in your company
5 about the machine is that it could do
6 individual slide heating.

7 "Answer: Yes."

8 Did you give that testimony, sir?

9 A. I have to believe you.

10 Q. Now, in the Spectrum 50, like the device
11 described in the 114 patent, is it correct
12 that the slides on the rotary carousel and
13 the reagents on the reagent carousel were
14 indexed to a dispensing station so that a
15 particular reagent could be dispensed onto
16 a particular slide?

17 A. That's true.

18 Q. And what is your understanding of this term
19 indexing the slides and the reagents to
20 dispense reagent onto the slide?

21 A. Rotating the carousels.

22 Q. Now, earlier you mentioned that you
23 provided demonstrations of the Spectrum 50
24 to third parties once the machine got
25 transferred over to Bogen's lab.

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1 stationary slides.

2 Q. So stationary -- I'm sorry. So moving the
3 slides became a necessary component for the
4 design that you all came up with.

5 A. The slides were lighter and smaller than
6 the other objects that we wanted to relate
7 them to, so we moved the smaller element.

8 Q. Did you ever design a slide processing
9 device in which the slide platform did not
10 move but which had the capability of
11 heating some slides to a first temperature
12 and heating other slides to a second
13 defined temperature?

14 A. The Spectrum 50 was the first device that
15 we designed that did that.

16 Q. Okay. But you may have missed a component
17 of my question. Did you ever design a
18 slide processing device in which the slide
19 platform did not move at all but which had
20 the capability of heating some slides to a
21 first defined temperature and heating other
22 slides to another defined temperature?

23 A. No, we didn't do that.

24 Q. Did you ever conceive of a slide processing
25 device in which the slide platform did not

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1 261 patent the slide platform, whenever
2 it's discussed, is described as rotating,
3 correct?

4 MR. ZELIGER: If you remember.

5 A. Yeah, as far as I remember.

6 Q. Okay. Is there any passage in the 261
7 patent, according to your understanding,
8 which demonstrates that you and your
9 co-inventors contemplated the use of a
10 non-moving slide platform as being within
11 the scope of your invention?

12 MR. ZELIGER: May I have that
13 back, please?

14 (The record was read as
15 requested.)

16 MR. ZELIGER: Including the
17 claims?

18 MR. SHULMAN: No. The
19 description right now.

20 MR. ZELIGER: Okay.

21 A. I don't remember such a passage.

22 Q. Okay. Now, at some point after the phase 2
23 device was completed, you began working
24 with a company called Product Genesis to
25 further develop the prototype, correct?

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1 heated slides on the rotating platform to
2 the stationary base, correct?

3 A. Yes.

4 Q. And by reducing the number of wires,
5 Mr. Purbrick made the loop that carries the
6 wires from the rotating platform to the
7 stationary base sufficiently flexible so
8 that the platform could freely rotate
9 during operation, correct?

10 A. Yes.

11 Q. And that solution to the wiring loop issue
12 is what led to the filing of the
13 application of the 261 patent, correct?

14 A. I assume.

15 Q. And do you agree, sir, that if the slide
16 platform had been stationary as opposed to
17 rotating, then there was no need to reduce
18 the number of wires between the platform
19 and the base.

20 A. Correct.

21 MR. ZELIGER: Objection to the
22 form of the question. Calls for
23 speculation. But you may answer.

24 MR. SHULMAN: Did you get his
25 answer?

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